IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GLENN DISTRIBUTORS CORP.	:	CIVIL ACTION
	:	
v.	:	
	:	
CARLISLE PLASTICS, INC.	:	98-2317

MEMORANDUM

Giles, C.J. August ___, 2000

Glenn Distributors Corp. ("Glenn") brought this diversity action against Carlisle Plastics, Inc. ("Carlisle"), seeking damages for breach of a sales contract. A jury returned a verdict in favor of Glenn. It answered Special Interrogatories finding that the parties had formed a contract, that Carlisle had breached it, that Glenn had lost profits in the amount of $230,003 for goods ordered but not delivered, and that Glenn was owed $14,000, plus interest, for goods paid for but not delivered. Carlisle now moves, pursuant to Fed. R. Civ. P. 50(b), for Judgment as a Matter of Law. For the reasons that follow, the motion is granted as to Glenn's claim of lost profits. Therefore, this court rules that Glenn's entitlement for breach of contract is limited to the $14,000 paid to Carlisle, plus interest, for a total judgment of $16,139.40.

Background

Factual Background

Glenn is in the business of purchasing and reselling close out items. These are items or products originally intended for sale to retailers but which remain unsold for various reasons: the particular item was discontinued; the item was seasonal; the expiration dates were drawing to a close; or the retail size or packaging had changed and a decision was made to dispose of the old packages. Glenn does not limit its business to the purchase and sale of particular types of goods,

but rather trades in a wide range of food, plastics, and other items. Glenn purchases products from, among others, Hershey, Nestle, Carnation, and Johnson & Johnson, as well as Carlisle. Glenn finds and purchases close-out products through contacts with manufacturer sales representatives and at trade shows; it resells the items to various customers, mainly by bringing them to warehouses located in Philadelphia, New York, and Chicago. Glenn Segal ("Segal") is the founder and president of Glenn.

Carlisle is in the business of manufacturing plastic items, particularly trash bags, and selling to both wholesale and retail customers. Carlisle sells close-outs to numerous close-out purchasers, such as Glenn. Glenn purchases two broad categories of trash bags from Carlisle, one sold under the brand name "Ruffies," the other being "private label," items sold under various generic or supermarket store names. Glenn and Carlisle have a business relationship dating back at least to 1995.

The material facts surrounding this particular business transaction are not in dispute; in dispute are the meaning and consequences of the transaction at issue. On or about June 5, 1997, Carlisle faxed to Glenn a six-page list ("June 5 List"), entitled "Obsolete Finished Good and Packaging As of 6/5/97" and "Close-out Product Listing 6/5/97," presenting approximately 200 types of plastic trash bags for sale to Glenn. At the bottom of each page it stated, "Quantities Subject to Change" or "All Quantities Subject to Change."

On June 12, 1997, Glenn faxed to Carlisle Purchase Order 10354 ("P.O. No. 10354"), a signed offer ordering various items from the list in amounts totaling approximately $990,000.[1]

[1] Testimony at trial reveals that, on June 11, 1997, Glenn initially offered to purchase the inventory on the list for the sum of $1, 075,000. Prior to receiving a response to this offer, Glenn Segal called Sandy Johnson at Carlisle, canceling the offer and telling her that he would fax a

The Order stated that "Quantities are Per Faxed List from Carlisle on June 5, 1997." It also asked Sandy Johnson ("Johnson"), Carlisle's national sales manager, to "Please Sign and Fax Back and Call for Delivery Appts [sic]." Jack Zimmerman, at the time the controller for Carlisle, signed a copy of P.O. No. 10354 on behalf of Carlisle and faxed it back to Glenn later that day.

On June 13, 1997, Johnson sent a memorandum to Segal ("June 13 letter"). The memorandum first stated "I would like to thank you for the order you placed for all of our close-outs." The memo then confirmed Glenn's order, breaking it down by category of product, number of cases ordered, total price, and per-case price. The memo informed Glenn that Johnson "had to enter the orders with a per case price so that if the quantities change we have a way to bill you for only what you have received." The memo offered an additional 2,184 cases for sale, which Glenn accepted, bringing the total order to just below $1 million.

On or about June 12, 1997, Glenn sent Carlisle a check, dated June 12, 1997, for $100,000, the first of eight payments to Carlisle totaling $750,000 between June and September 1997. Glenn never paid for the remaining $250,000 of products ordered.

Carlisle began shipping goods within a few days of June 12 and sent goods in a steady stream through August of 1997. Glenn received approximately $736,000 worth of trash bags. Carlisle never shipped the remaining ordered goods. Carlisle concedes that some of the goods ordered but not delivered were sold to retail customers. According to Glenn, it overpaid by $14,000 for the goods that it did receive, as stated in the invoices.[2]

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new offer, which was P.O. No. 10354.

[2] Carlisle disputes the amount of overpayment, placing the value of the goods received at approximately $747,000. One of the issues at trial was the amount of Glenn's overpayment, $14,000 as alleged by Glenn or $3,000 as alleged by Carlisle.

Procedural History

The case was tried to a jury beginning on May 10, 2000. On the issue of liability, Glenn presented Segal's testimony as to the course of this and previous transactions between Glenn and Carlisle and as to his understanding of what the contract required in terms of Glenn's payment obligations and Carlisle's shipping obligations. Carlisle presented Johnson's testimony on the same issues. The key dispute was the meaning of the phrase "quantities subject to change."[3]

On the issue of damages, Glenn sought to recover the amount of net profits it would have earned by reselling the trash bags purchased by Glenn but not delivered by Carlisle. Glenn also sought the return of the amount it overpaid to Carlisle for the goods that were shipped.

On the latter issue, Segal testified that the goods Glenn received were worth approximately $736,000, that Glenn paid Carlisle $750,000, and that Glenn was entitled to a return of $14,000; Johnson testified that she believed the amount owed to be approximately $3,000, giving a higher value to the goods shipped. The jury, presented with the choice between those figures, accepted Segal's figure and awarded $14,000. That finding is not challenged and will not be disturbed on review.

On the former issue, Glenn calculated lost profits based upon a 104-page document ("Damages Report"), which contained Segal's assignments of the average gross and net profits made on trash bags purchased and delivered from Carlisle under P.O. No. 10354. Segal, who has no accounting background, described how he created the document. He reviewed all the invoices showing the products that Glenn received from Carlisle and compared those with the

[3] There also was a dispute as to whether Glenn was obligated to pay for the goods prior to delivery. This point was not argued on the instant motion.

number of cases of each type of trash bag offered on the June 5 List and accepted on P.O. No. 10354. He recorded the invoice number and name of each item received, the number of cases of the item received, the price per case, and the total cost to Glenn for that item. He then recorded the price at which Glenn had sold that particular item, the total profit (or loss) on it, the profit per case, and the average profit earned for that item. Segal then divided the products into six categories, based on the per-case purchase price of the items, and computed the average selling price for the items in that category and the average profit for that entire category. He then determined, by comparing invoices and receipt documents with the June 5 List and June 13 letter, how many cases in a particular category had been purchased, how many were delivered, and how many were not delivered. He multiplied that last number by the average cost for that category and multiplied that number by the average profit margin for the items in that category. This produced the total lost profit from each category.[4] He then added the lost profits (or losses) from the six categories, reaching a total gross lost profits of $264,708.92.

Segal testified that he reviewed Glenn's financial documents, which were kept by the company's accountant, and determined that Glenn's operating expenses were 6.57 % of total

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[4] For example, one category of items cost $4.50 per case. According to Glenn's calculations, 103,194 cases of trash bags in this category were ordered, 78,599 were delivered, and 24,595 should have been delivered but were not. The total cost of the undelivered items in that category was $100,677.50. The average profit for this category was 130%. Multiplying the total cost by 130%, Glenn calculated lost profits in this category to be $143,880.75.

As a second example, another category of items cost $4.53 per case. According to Glenn's calculations, 70,601 cases were ordered, 51,531 were delivered, and 19,070 were not delivered. The total cost of the undelivered items in that category would have been $86,387.10. The average profit margin for the category was 63%; multiplying the total cost by 63%, Glenn calculated lost profits in this category of $54,423.87.

Segal made the same calculations for all six categories. It lost money in one category and made a profit in the other five.

sales.[5] He testified that the total selling price for all the trash bags received from Carlisle under P.O. No. 10354 was $528,240.84; 6.57 % of that is $34,705.42 in operating costs. Segal subtracted this number from the gross lost profits and reached the figure of $230,003.20 in net lost profits. This is the amount Glenn sought to recover in this case.

On cross-examination, Carlisle challenged the reliability of the Damages Report. Segal acknowledged that any items listed in the Damages Report also should have been listed on the June 5 List or in the June 13 letter from Johnson and that any items not appearing on the June 5 List or June 13 letter should not be in the Damages Report. Segal conceded that approximately 60 cases of 20 items included in the Damages Report were trash bags not sold by Carlisle. On redirect, Segal re-calculated the damages allowing for this mistake and offered that the overall difference was a minor amount.

The other subject of contention was whether certain other items contained in the Damages Report, even if they came from Carlisle, actually appeared on the June 5 List or the June 13 letter, so as to be part of P.O. No. 10354, as opposed to some other close-out purchase for which evidence of prices was not provided. Segal testified that, because his method of record-keeping differed from that of Carlisle, he was unable to match specific items on the Report to the June 5 list, especially where the items were private-label trash bags. When questioned about specific items, Segal was unable to say if they were part of P.O. No. 10354, but only that those were the goods that had been shipped by and received from Carlisle beginning around June 1997, the

[5] Segal is not an accountant and Glenn did not present the testimony of the company's accountant to support that figure. Segal testified that the figure of 6.57 % was in the same neighborhood as Glenn's operating costs over the years and was consistent with Segal's understanding of the company's operating costs, given the low-budget nature of Glenn's operations, which utilized a small staff and used older physical facilities.

relevant time period for this transaction. Segal also testified that he never purchased private-label close-out trash bags from any producer other than Carlisle.

Johnson testified on behalf of Carlisle that she could determine whether the items contained in June 5 list and the Damages Report matched; she testified as to several specific items contained in the Report that were not on the June 5 list, the June 13 letter, or P.O. No. 10354, for example, items by Arrow, Sure Fine, Dominix, and Bonnie Hubbard. (Johnson N.T. 5/12/00, at 93-95). Johnson also reviewed several pages of the Report at random and testified that there were a number of items contained therein that were not sold to Glenn as part of P.O. No. 10354; for example, ten items on page 15; fifteen items on page 16; thirteen items on page 41; fifteen items on page 59; eleven items on page 62; about 11 items on page 86 . (Johnson N.T. 5/12/00, at 94-96). She testified, however, that all of the goods in the Damages Report had, at one time or another, been manufactured by Carlisle. She also stated that she did not know whether or not some goods were substituted for others at the warehouse at the time of shipping to make up for a shortfall, although the shipping department does not have the authority to do so.

Segal also testified as to Glenn's efforts at cover, that is, to find replacement goods to sell and recoup its lost profits. According to Segal, he went to trade shows, looked in the marketplace, and spoke to salesmen, attempting to find both Ruffies and other supermarket brands, without success. He did not identify anyone to whom he spoke at trade shows. He testified that Ruffies brand only was available from Carlisle and that he was not able to find supermarket brands at the close-out prices. Segal acknowledged that Glenn did not have contracts or oral or written agreements with any particular purchasers for any particular goods and no customer had a legal obligation to purchase any additional goods that Glenn might have

received from Carlisle. However, Segal also testified that, based on his experience in running the business, he would have been able to sell additional Carlisle trash bags had they been delivered. He testified that he had received and sold almost 75 % of the goods received under P.O. No. 10354 within a few months of receiving the goods, and therefore he believed that he could have sold the other 25% with no problem. He also testified that Glenn had completed four or five orders with Carlisle previously and never had any difficulty selling Carlisle trash bags. Moreover, he testified that several customers who previously had purchased Carlisle products from Glenn were happy with the product, were looking for more, and were waiting for additional goods to be shipped to Glenn. There was no testimony as to any other efforts to find and sell products recoup profits and no testimony as to what Glenn did or attempted to do with the $250,000 that it did not send to Carlisle under this contract.

On cross-examination, Segal stated that the only two options he could see for obtaining identical or substitute goods were to purchase goods from Carlisle or to buy the same goods from a supermarket at retail, a higher price. He further testified that he thought about who else might make private label trash bags but could not think of anyone. He further stated that he spoke to someone at Carlisle and to a former Carlisle salesman named David Rose, but did not speak to anyone else about trying to replace the trash bags that were not delivered.

On May 15, 2000, the jury returned answers to Special Interrogatories as follows:

1. Has the Plaintiff proven that there was an agreement between the parties that contained the terms of quantity, price, delivery, and payment that the Plaintiff contends were understood and agreed upon? YES

2. Considering the agreement as you have found it, has the Plaintiff proven that the Defendant breached it? YES

3. In what dollar amount, if any, has the Plaintiff proven, to a reasonable degree of certainty, its lost profits for goods ordered but not delivered? $230,003.00.

4. In what dollar amount has the Plaintiff proven that it is entitled to the return of money paid for goods which were not delivered? $14,000.

If the verdict as molded were to stand, Glenn also would be entitled to prejudgment interest on the overpayment amount (although not on lost profits) at the statutory rate of 6%, from November 1, 1997 to May 18, 2000, for an additional award of $2,139.40 bringing the total award for overpayment to $16,139.40 and the total damages award to $246,142.40.

At trial, Carlisle moved to exclude the Damages Report. It also moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a). The motion was taken under advisement and the case was submitted to the jury, subject to a later determination of the various legal issues raised in that motion. Following the verdict, Carlisle renewed its motion, pursuant to Fed. R. Civ. P. 50(b).

Discussion

This court has subject matter jurisdiction based on diversity of citizenship, pursuant to 28 U.S.C. § 1332(a)(1), as the corporate parties are citizens of different states and the amount in controversy exceeds $75,000. See also 28 U.S.C. § 1332(c)(1) (stating that a corporation is deemed a citizen of its state of incorporation and of its principal place of business). Venue is proper in this judicial district, as a substantial part of the performance of the sales contract at issue in this action occurred in Pennsylvania. See 28 U.S.C. § 1391(a)(2); see also Frontier Ins. Co. v. National Signal Corp, Civ. No. 98-4265, 1998 WL 778333, *5 (E.D. Pa. 1998) (Giles, J.) (holding that, in a breach of contract action, the court would look to the place of performance of the contract in determining whether venue is proper). Pennsylvania law governs this action, and

this court, sitting in diversity, is bound to apply Pennsylvania law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

Rule 50(b) Standard

Rule 50 of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law in jury trials and allows the trial court to remove cases or issues from the jury's consideration when the facts are sufficiently clear that the law requires a particular result. See Weisgram v. Marley Co., 120 S. Ct. 1011, 1016-17 (2000) (quoting 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2521, 240 (2d ed. 1995)). A court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a); Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2109 (2000). This court must "view the evidence in the light most favorable to the non-moving party and determine whether the record contains the 'minimum quantum of evidence from which a jury might reasonably afford relief.'" Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 691 (3d Cir. 1993) (quoting Keith v. Truck Stops Corp., 909 F.2d 743, 745 (3d Cir. 1990)). This court may grant a Rule 50 motion only if it can be said as a matter of law that the verdict is not supported by legally sufficient evidence, see Parkway Garage, 5 F.3d at 691-92 (citation omitted), and thus there is insufficient evidence from which a reasonable jury reasonably could find in favor of the nonmovant. See McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995) (quoting Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993)), cert. denied, 516 U.S. 1146 (1996); Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 262 (3d Cir.), cert. denied, 516 U.S. 915 (1995).

The Supreme Court recently clarified that, in ruling on a Rule 50 motion, this court must review all the evidence in the record as a whole, drawing all reasonable inferences in favor of the nonmoving party and disregarding all evidence favorable to the moving party that the jury is not required to believe. See Reeves, 120 S. Ct. at 2110.[6] This court must give credence to the evidence favoring the nonmovant and to the evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent it comes from a disinterested witness. See id. (quoting 9A Wright & Miller § 2529, at 300). In ruling on the motion, this court may not make credibility determinations, weigh the evidence, resolve conflicts in evidence, substitute its own version of the facts, or attempt to draw inferences from the facts. Those are the functions of the jury, not the judge. See Reeves, 120 S. Ct. at 2110 (citation omitted); McDaniels, 59 F.3d at 453 (quoting Lightning Lube, 4 F.3d at 1166); Parkway Garage, 5 F.3d at 691.

Bases for Rule 50 Motion

Carlisle challenges the verdict both as to liability and as to damages. First, on the issue of liability, it argues that there was no basis for the jury to find that Carlisle breached the contract because Carlisle was not required to ship any specific quantity of goods. Second, on the issue of damages, Carlisle argues that there was no legal basis for the jury to award lost profits, because Glenn did not provide sufficient evidence of the amount of its lost profits and because Glenn did not provide sufficient evidence that it made reasonable efforts to cover, as required under

[6] This is in contrast to those courts that limited review only to the evidence favorable to the non-moving party. See Reeves, 120 S. Ct. at 2110 (citing cases). Reeves did not change anything in the third circuit, where the standard previously required the district court to review the entire record in the light most favorable to the nonmovant and to draw all fair and reasonable inferences in the nonmovant's favor. See, e.g., McDaniels, 59 F.3d at 453; Blanche Road Corp., 57 F.3d at 262.

Pennsylvania law. This court addresses each in turn.

Liability

Carlisle first argues that it is entitled to judgment as a matter of law as to liability for breach of contract. Carlisle argues that the terms "Quantities Subject to Change" and "All Quantities Subject to Change," which appeared on the June 5 List and which were incorporated by reference into all the later documents comprising the contract between the parties, is clear and unambiguous, and, as a matter of law, means that quantities could change for any reason prior to shipping, without Carlisle breaching the contract. Therefore, its failure to ship all the items on the List was not a breach of the contract.

As a preliminary matter, this court already held that this term is ambiguous. See Glenn Distributors v. Carlisle Plastics, Inc., Civ. No. 98-2317, 2000 WL 102498, *1 (E.D. Pa. 2000) (Giles, C.J.) ("Glenn II").[7] That term is "reasonably or fairly susceptible of different constructions" and "capable of being understood in more senses than one." See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995) (quoting Samuel Rappaport Family Partnership v. Meridian Bank, 657 A.2d 17, 21 (Pa. Super. Ct. 1995) (quoting in turn Krizovensky v. Krizovensky, 624 A.2d 638, 642 (Pa. Super. Ct. 1993))). In initially granting summary judgment in favor of Carlisle and against Glenn, this court had held that "the relevant language of the contract is reasonably capable only of one construction and only can reasonably

[7] This court initially granted summary judgment in favor of Carlisle and against Glenn, holding that the "quantities subject to change" language was unambiguous. See Glenn Distributors Corp. v. Carlisle Plastics, Inc., Civ. No. 98-2317, 1999 WL 695873, *3 (E.D. Pa. 1999) (Giles, C.J.) ("Glenn I"). This court then granted Glenn's Motion for Reconsideration, vacated its Memorandum and Order granting summary judgment, and held that the language of the contract was ambiguous. See Glenn II, 2000 WL 102498, at *1.

be understood in one sense." Glenn I, 1999 WL 695873, at *4. However, in reconsidering and vacating that opinion, this court held that the term in fact was ambiguous. See Glenn II, 2000 WL 102498, at *1.

The jury resolved this ambiguity in favor of Glenn, concluding that the term "subject to change" did not permit Carlisle to fail to deliver the close-out items to Glenn and instead to convert and sell the close-out items to retail customers. The jury reasonably could have concluded that every item on the June 5 List and June 13 letter was identified as a close-out good and that, by definition, a close-out good no longer was subject to being sold to retail customers. Therefore, the sale of any of the items from the June 5 List or June 13 letter to retail customers, which Carlisle concedes is what happened, could have been viewed as a breach of the contract, particularly of the implied covenant of good faith and fair dealing. Moreover, in the June 13 letter, Johnson thanked Glenn "for the order you placed for all of our close-outs." (emphasis added). The jury reasonably could have concluded from this language that Glenn indeed had purchased every close-out item on the June 5 List and that Carlisle was obligated to deliver and Glenn obligated to pay for every listed item.

Damages

As part of the damages award, the jury found in favor of Glenn in the amount of $14,000 plus interest, representing the amount Glenn actually deposited with Carlisle in excess of the value of the goods actually received. See 13 Pa. C.S. § 2711(a) (stating that buyer may recover "so much of the price as has been paid"). The jury heard testimony from Segal that Glenn had overpaid by $14,000 and Johnson's rebuttal that Glenn had overpaid only by $3,000. The jury accepted Segal's testimony and awarded $14,000. Glenn also is entitled to prejudgment interest

at the statutory rate of 6% simple interest, running from November 1, 1997 until May 18, 2000, in the amount of $2,139.40. Therefore, the total calculation on this aspect of damages is $16, 139.40. Carlisle does not challenge this aspect of the jury's damage award and it will not be disturbed.

The jury also found in favor of Glenn in the amount of $230,003 for lost profits on the goods not delivered. Carlisle challenges two aspects of this award: first, the sufficiency of the evidence as to the amount of lost profits, and second, the sufficiency of Glenn's efforts to obtain cover. This court considers each in turn.

Damages Report and Proof of Amount of Lost Profits

Carlisle argues first that Glenn did not meet its burden of proving its claim for lost profits because the evidence was insufficient to establish the amount of lost profits beyond the point of pure speculation. Under Pennsylvania law, lost profits are recoverable by buyers as consequential damages in a case of breach of contract by a seller, where the profits are "'lost on a particular sale or contract for the performance of which the goods in questions were purchased.'" National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 495 (3d Cir. 1987) (quoting Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1226 (3d Cir.), cert. denied, 400 U.S. 826 (1970)), abrogated on other grounds, AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915 (Pa. 1990); see also 13 Pa. C.S. § 2715(b)(1) (providing for recovery of "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know"). Carlisle was aware that Glenn purchased the trash bags in order to resell them, therefore, upon proper proof, lost profits would be recoverable in the instant case.

However, lost profits are not recoverable automatically under Pennsylvania law. They are recoverable only if there is evidence to establish the damages with reasonable certainty. See Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 680 (3d Cir. 1991) (citing Delahanty v. First Pennsylvania Bank, 464 A.2d 1243, 1258 (Pa. Super. Ct. 1983)). "Proof of damages need not be mathematically precise, but the evidence must establish the fact 'with a fair degree of probability.'" Advent Sys., 925 F.2d at 680 (quoting Exton Drive-In, Inc. v. Home Indem. Co., 261 A.2d 319, 324 (Pa. 1969), cert. denied, 400 U.S. 819 (1970)); see also Advent Sys., 925 F.2d at 681 (discussing National Controls and emphasizing the "need for evidence sufficiently concrete to provide a reasonable degree of certainty that the verdict is more than the result of a lottery or emotional reaction").

The only evidence from Glenn as to the amount of its lost profits is the Damages Report prepared by Segal and his testimony. Carlisle challenges the reliability of the Damages Report, that is, Carlisle argues that the Report is unreliable and fails to establish the amount of lost profits with reasonable certainty or a fair degree of probability. The reliability of evidence goes to its weight rather than to its admissibility, see United States v. Velasquez, 64 F.3d 844, 848 (3d Cir. 1995), making it a question to be decided by the jury.

Glenn admitted through Segal that approximately 60 cases of 20 different items used in calculating net lost profits were not Carlisle products and were not sold to Glenn under this contract. Segal did recalculate the lost profits without those 60 items, however, and Glenn urges that any difference in the final figures is infinitesimal. The jury apparently agreed and there is no basis to disturb that finding.

Johnson testified, based on her knowledge of the products that Carlisle sells, that other

items used by Segal in creating the Damages Report were not on the June 5 list or June 13 letter and were not shipped as part of P.O. No. 10354. For example, Johnson stated that she reviewed the entire 104 pages of the Damages Report and pointed to several specific items contained in the Damages Report that were not on the June 5 List, the June 13 letter, and P.O. No. 10354, for example. (Johnson N.T. 5/12/00, at 93-95). Johnson also reviewed several pages of the Report at random and testified that there were a number of items contained therein that were not sold to Glenn as part of P.O. No. 10354. (Johnson N.T. 5/12/00, at 94-96). However, Johnson conceded that every item included in the Damages Report had, at one time or another, been produced by Carlisle. Segal also testified that every item included in the Damages Report was received from Carlisle since June 1997, the relevant time period for this transaction, and that Glenn did not purchase private-label trash bags from any producer other than Carlisle. (Segal N.T. 5/11/00, at 92:8). Johnson also testified that she did not know whether substitutions had been made at the warehouse at the time of shipping, although she did state that the shipping department had no authority to do so.

The jury heard all of this evidence and was entitled to consider all of it, particularly the credibility of witnesses. The jury apparently believed Segal's testimony that the only items that Glenn sold and included in the Damages Report had been shipped by Carlisle during the relevant time period and that any private-label bags had been received from Carlisle. The apparently concluded, therefore, that the Damages Report was sufficiently reliable as to be accorded controlling evidentiary weight and that it accurately reflected the amount of Glenn's lost profits. There was sufficient evidence to support that finding and no basis to disturb it.

Proof of Efforts at Cover

This cannot end this court's inquiry as to lost profits, however. Glenn also must present sufficient evidence of its reasonable efforts to "cover," that is, to purchase and resell replacement goods in an effort to offset its anticipatory losses. Because the evidence does not support a jury finding that Glenn made reasonable efforts under the circumstances to cover, Glenn is precluded as a matter of law from recovering lost profits. Thus, the jury award of lost profits cannot stand.

A buyer's failure to cover when cover reasonably is available precludes recovery of consequential damages, such as lost profits. See 13 Pa. C.S. § 2715(b)(1) (providing for the recovery of such consequential damages "which could not reasonably be prevented by cover or otherwise"); see also National Controls, 833 F.2d at 495 (stating that, under Pennsylvania law, lost profits are recoverable as consequential damages in proper cases). A buyer covers by "making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." 13 Pa. C.S. § 2712(a). The Pennsylvania Uniform Commercial Code envisions goods qualifying for cover to be "goods not identical with those involved but commercially usable as reasonable substitutes under the circumstances of the particular case." 13 Pa. C.S. § 2712 cmt. 2. The test of proper cover is "whether at the time and place the buyer acted in good faith and in a reasonable manner." Id. The plaintiff bears the burden of proof of establishing that it made good faith and reasonable efforts to cover. Cf. Big Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 487 A.2d 953, 959 (Pa. Super. Ct. 1985) (discussing plaintiff's burden of proof of establishing cover).

On direct examination, Segal testified about his cover efforts, stating that, in general, he went to trade shows and spoke to trash bag salesmen in efforts to find replacement items and that he was unable to find replacement bags at close-out prices. More specifically, he testified on

cross examination that he talked only to two people–someone at Carlisle and David Rose, a former Carlisle salesman. He also stated that he tried to think of where else he might find replacement trash bags at close-out prices, but was unable to think of anyplace or anyone. He stated that he felt that his only other option was to go to a supermarket and purchase the items he wanted at retail prices. There are two problems with this evidence.

First, it is not detailed or specific enough to establish that Glenn took reasonable efforts under the circumstances . Even drawing the most favorable inferences from his testimony, it establishes only that Segal talked to several people in the industry but could not find the identical Carlisle products (Ruffies or similar private-label trash bags) from any other manufacturer at the same prices. However, the cover obligation is a general duty to mitigate or reduce damages. Cf. Big Knob Volunteer Fire Co., 487 A.2d at 961. A cover opportunity need not enable Glenn to recoup all its losses, only some portion of them. A cover good need not be identical, but only a good that is a reasonable commercial substitute. Therefore, if Glenn could find substantially similar, even if not identical goods, at similar, even if slightly higher prices, it was obligated to purchase and attempt to sell those goods. Only if the profits earned on such cover sales were less than the profits that would have been earned under the Carlisle contract, would the difference be recoverable as lost profits damage.

What is noteworthy about the evidence of cover is what is missing. Segal does not identify any competing manufacturers or other sources to whom he actually spoke about purchasing replacement goods. He does not identify anyone, other than Carlisle itself and a former contact at Carlisle, to whom he spoke at trade shows. He provides no details about what he learned about the price and availability of reasonable substitutes from any conversations that

he had. He provides no details about whether there were goods available in the market or from other manufacturers that were substantially similar and why any such goods were not reasonably suitable substitutes. Nothing was presented to show that Segal took efforts that, based on his twenty years of experience in the business, reasonably might have enabled Glenn to find and sell replacement goods under the circumstances.

Second, Glenn's efforts at cover were not reasonable as a matter of law, given the nature of its business. As discussed supra, cover is not limited to purchasing identical goods; rather, the goods must be "commercially usable as reasonable substitutes under the circumstances of the particular case." 13 Pa. C.S. § 2712 cmt. 2. In other words, it must be an item that the plaintiff, in the course of its business, could sell for a similar profit. Glenn is not in the business of selling trash bags; Glenn is in the business of selling a myriad of close-out items from a myriad of manufacturers, including Hershey, Nestle, Carnation, and Johnson & Johnson, to a myriad of purchasers. Moreover, Glenn did not have specific contracts, agreements, or written or oral orders to sell trash bags to specific customers. Glenn was not obligated to sell trash bags to any particular customer. At best, several customers expressed an interest in purchasing additional Carlisle items in the future.

Under the circumstances, Glenn's cover duty required it not only to look for replacement trash bags to sell to the same customers as had bought previous Carlisle products, but to look for any replacement close-out items from any of its suppliers that Glenn could re-sell to any customers to recover some or all of its profit. For example, Glenn could have recouped some of its lost profits by purchasing and reselling Hershey product to some customer, although perhaps not to the same customers which would have purchased the trash bags. However, there is no

evidence that Glenn took any steps to look for, purchase, or sell items other than trash bags. There also is no evidence that Glenn did anything with the $250,000 that it held and controlled and could have used to purchase cover goods. Glenn's legal obligation was to make reasonable efforts and to present evidence of those efforts or to present evidence of why some cover approach would have been unreasonable. Absent more substantial evidence that it met or attempted to meet its reasonable cover obligations, Glenn cannot recover lost profits.

Glenn points to the fact that the jury had re-read to it Segal's testimony on cover, which Glenn argues shows that the jury carefully weighed and considered the evidence and Segal's credibility. While that might be true, it does not change the fact that the evidence of cover presented to the jury was, as a matter of law, insufficient to support that verdict. Glenn's obligation was to present "the minimum quantum of evidence from which a jury might reasonably afford relief." Parkway Garage, 5 F.3d at 691 (citation omitted). Glenn failed to present the minimum quantum of evidence on the question of cover that is required as a matter of law.

Conclusion

For the foregoing reasons, Carlisle's motion for judgment as a matter of law is granted. Accordingly, the jury verdict and judgment in favor of Glenn in the amount of $244,003 is vacated. Judgment shall be modified and entered in favor Glenn and against Carlisle in the sum of $16,139.40, plus legal interest from May 18, 2000 to the date of this Judgment.

An appropriate order follows.